Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1847

PAUL A. MASON, *Petitioner,*

v.

JANET BELL MCDOWELL, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This matter is before this Court on Petitioner's Petition for Writ of Certiorari following the refusal by the District Court for the Western District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit of a Petition for Writ of Habeas Corpus.

The Petitioner, Paul A. Mason, and the Respondent, Janet Bell McDowell, were divorced in 1975 and were at the time the parents of two children, Lisa Maria and Christa Mae. Custody of Lisa (then 4 years old) was given to Petitioner and custody of Christa (then 1 year old) was given to Respondent by a decree of an Alabama Court. Petitioner subsequently moved to West

Virginia and Respondent moved to Pennsylvania. On March 15, 1976, during a visitation by Lisa with her mother, Respondent filed a Complaint for Custody of the children in the Court of Common Pleas of Allegheny County, Pennsylvania. On that date, the Court entered an Order scheduling a hearing for May 25, 1976 and also ordered that, pending the hearing, Petitioner was enjoined from removing either child from jurisdiction.

The Petitioner filed Preliminary Objections to the Complaint for Custody. That petition raised only two issues: First, that the Alabama decree awarding custody was *res judicata*. Second, that there was improper personal service and hence the jurisdiction of the Court of Common Pleas of Allegheny County was not properly invoked.[1] The Preliminary Objections were dismissed by the Court of Common Pleas and appeals to the Superior Court off Pennsylvania and the Supreme Court of Pennsylvania were both unsuccessful. As the Circuit Court stated in its Opinion:

> "There is no indication that the federal constitutional claims asserted in the Petition for Habeas were ever raised in the state courts, and the Petitioner did not pursue his appeal from the State's highest Court to the United States Supreme Court." (A.3a)

Furthermore, Petitioner has never sought the hearing to determine custody in the Court of Common Pleas. Instead, Petitioner filed a Petition for Writ of Habeas Corpus, which is the subject of this Petition for Writ of Certiorari. The District Court dismissed the Petition for Writ of Habeas Corpus on three separate, alternative

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[1] This claim was abandoned at the hearing on the preliminary objections.

theories: (1) The case was moot because the Order had expired, (2) the Petitioner had not exhausted his State remedies, and (3) federal habeas corpus is not available to challenge a child custody order entered by a state court. The Court of Appeals affirmed solely on the gound that Petitioner had not exhausted his State remedies.

STATEMENT OF QUESTION PRESENTED FOR REVIEW

The question presented for review by this Court is whether federal habeas corpus jurisdiction is available under circumstances where Petitioner seeks determination of child custody and where Petitioner has failed to exhaust his State remedies.

ARGUMENT

A. Petitioner Has Failed To Exhaust His State Remedies.

28 U.S.C. § 2254, under which Petitioner alleges jurisdiction in this matter, provides, *inter alia:*

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has a

> right under the law of the State to raise, by any available procedure, the question presented."

The Petitioner has failed to exhaust his administrative remedies in accordance with the requirements of 28 U.S.C. § 2254. The constitutional claims which Petitioner herein asserts have never before been raised in the State courts. As the Circuit Court stated:

> "There is no indication, either, in the pleadings or in the Record as a whole, that [the Petitioner] has ever brought his constitutional claims before a State court. [Footnote omitted] We therefore hold that he has not exhausted available State remedies as the statute requires, and that dismissal of the Writ was proper on this ground (A.4a-5a)."

The record before this Court is void of any constitutional claim being made in the State courts. The petition to dismiss the Complaint for Custody raised only two grounds: (1) *res judicata* of the Alabama decree, and (2) lack of jurisdiction due to improper service of process. The second claim was abandoned. The Court of Common Pleas dismissed the Preliminary Objections on the issue of *res judicata*. No constitutional claim was made before that Court nor was such constitutional claim subsequently made before the Superior Court of Pennsylvania or the Supreme Court of Pennsylvania. There is only the Petitioner's self-serving statement, made for the first time in the instant Petition for Writ of Certiorari, that the constitutional claims were orally raised in the State court. This statement stands in complete contradiction, however, of the record before this Court.

There exist at least two State remedies which were and are available to the Petitioner to seek the identical relief which Petitioner seeks herein. The first remedy is

the Pennsylvania Habeas Corpus Act, which permits an application for habeas corpus to inquire into the cause of detention of any person restrained of his liberty within the Commonwealth of Pennsylvania under any pretense whatsoever. See, 42 Pa.C.S.A. 6501 *et seq.* The second remedy is the Pennsylvania Declaratory Judgments Act which grants to the Pennsylvania courts the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed and which permits the granting of further relief based on declaratory judgments. See, 42 Pa.C.S.A. 7531 *et seq.*

It should again be noted that Petitioner could have raised these constitutional claims in the Complaint for Custody proceedings. It should be further noted that Petitioner has failed to request that the hearing in the Complaint for Custody proceedings. It should be further noted that Petitioner has failed to request that the hearing in the Complaint for Custody proceedings be had in order that the merits of the custody dispute be finally resolved.

B. Federal Habeas Corpus Jurisdiction Is Not Available In Child Custody Matters.

Although the Circuit Court found it unnecessary to reach this issue, this Court should take cognizance of the fact that the federal courts have rejected the use of the writ of habeas corpus to attack custody orders of state courts. See, *Donnelly* v. *Donnelly*, 515 F.2d 129 (1st Cir. 1975); *Armstrong* v. *Armstrong*, 508 F.2d 348 (1st Cir. 1974).

CONCLUSION

Based on the foregoing, this Honorable Court is requested to deny the extraordinary relief of habeas corpus.

Respectfully submitted,

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